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No. 91-1538

In the Supreme Court of the United States

OCTOBER TERM, 1991

SANDRA JEAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in the Federal Tort Claims Act extends to acts or omissions occurring in Antarctica.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 953 F.2d 1116. The opinion of the district court (Pet. App. 18-33) is reported at 702 F. Supp. 1480.

JURISDICTION

The court of appeals first issued its decision on May 1, 1991. The court of appeals issued a second opinion and withdrew its first opinion on December 24, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. 3. The petition for a writ of certiorari was filed on March 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the widow of John Emmett Smith. At the time of his death, Mr. Smith worked at McMurdo Naval Air Station, Antarctica, for a construction company under contract with the National Science Foundation.

Upon his arrival in Antarctica in October 1986, Mr. Smith attended an orientation briefing at which he was informed, *inter alia*, that Antarctica is a dangerous place and that foot plans had to be filed whenever individuals chose to participate in off-base recreational travel. Pet. App. 27-28. On November 23, 1986, Mr. Smith and two companions took a recreational hike to Castle Rock, located several miles outside of McMurdo Station. As required by applicable regulations, Mr. Smith and his companions filed a foot plan prior to their trip. The plan did not seek or obtain permission to deviate from the flagged route to Castle Rock. Pet. App. 30-31.

Mr. Smith and his companions followed the flagged route on their way to Castle Rock and for part of their return hike. They then departed from the flagged route to hike across a snow field in the direction of Scott Base, a New Zealand base located near McMurdo Station. Although Mr. Smith and one of his companions dropped into snow above their knees, they continued onward. Pet. App. 31-32.

After the three men had stopped for a snack, one of them took a step and suddenly dropped from sight. Mr. Smith then took a step and he, too, disappeared. Both men had fallen into a crevasse. Despite the efforts of American and New Zealand search and rescue personnel, Mr. Smith died from a combination of exposure and internal injuries suffered as a result of the fall. Pet. App. 33.

The United States neither owns nor exercises sovereignty over the area in which the accident

occurred. Pet. App. 30. New Zealand has asserted sovereign claims to that area, as well as to the area where McMurdo Station is located; those claims are not recognized by the United States. See generally *Beattie* v. *United States*, 756 F.2d 91, 107 (D.C. Cir. 1984) (Scalia, J., dissenting).

2. Petitioner filed this wrongful death action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, alleging that the United States had negligently failed to provide adequate warning of the dangers posed by crevasses in areas not on flagged paths. Petitioner based her claim exclusively on acts or omissions occurring in Antarctica, not on conduct in the United States. See Pet. App. 5 n.3.

The district court dismissed for lack of subject matter jurisdiction. Pet. App. 18-33. The court held that petitioner's claims were barred by the FTCA's specific exception for "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k); Pet. App. 20-26.

3. The court of appeals affirmed. Pet. App. 1-17. The court noted that the term "foreign country" is capable of different meanings, and looked to the language and structure of the FTCA in determining whether Antarctica should be treated as a foreign country under that statute. Pet. App. 5-6. The court first observed that the FTCA's venue provision permits tort suits to be prosecuted against the United States "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," 28 U.S.C. 1402(b), and concluded that permitting FTCA suits for claims arising in Antarctica would lead to the anomalous result that non-residents of the United States would have a cause of action for Antarctic injuries but no venue in which to bring it. Pet. App. 7-8. The court found it "unlikely that Congress intended to create a tort remedy in cases for which no venue exists." *Id.* at 8.

The court also relied on the FTCA's choice-of-law provision, which makes the United States liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Noting that Antarctica has no tort law at all, the court concluded "that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." Pet. App. 8 (quoting *Beattie* v. *United States*, 756 F.2d 91, 111 (D.C. Cir. 1984) (Scalia, J., dissenting)).

The court held in the alternative that, even if Antarctica were not properly characterized as a "foreign country" for purposes of the FTCA, petitioner's suit would nonetheless be barred. The court reasoned that the FTCA was "a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims," and held that the absence of any evidence of congressional intent to subject the United States to liability for claims arising in Antarctica precluded petitioner's suit. Pet. App. 9.

The court recognized that in *Beattie* v. *United States*, 756 F.2d 91 (1984), a divided panel of the District of Columbia Circuit had reached a contrary conclusion. However, the court noted its agreement "with the approach and conclusions of then Judge Scalia," who dissented in *Beattie*. Pet. App. 6.

Judge Fletcher dissented. Judge Fletcher reasoned that the purpose of the foreign-country exception was to ensure that the United States would not "find itself subject to liability under the laws of a foreign sovereign." Pet. App. 12. In her view, that underlying purpose would not be frustrated by permitting suits for injuries occurring in Antarctica, because Antarctica has no law to apply. *Ibid.* Instead, Judge Fletcher concluded that the court could properly apply the law of Oregon (the forum State and the State of petitioner's residence). *Id.* at 15.

ARGUMENT

1. Petitioner contends (Pet. 4-11) that the FTCA is applicable to claims arising in Antarctica because Antarctica is not "a foreign country" within the meaning of the FTCA. The court of appeals correctly rejected that contention.

The FTCA, which waives the federal government's immunity from suit in a limited category of cases, does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). "The words 'foreign country' are not words of art," and are used in Section 2680(k) "with the meaning dictated by 'common sense' and 'common speech.'" *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), cert. denied, 379 U.S. 867 (1964). As then-Judge Scalia's dissent observed in *Beattie* v. *United States*, 756 F.2d 91, 109 (D.C. Cir. 1984), "[t]he first dictionary meaning of 'country' is not 'sovereign state' but simply 'region,'" and the "first definition of 'foreign' is 'situated outside a place or country; *esp.* situated outside one's own country.'" Moreover, this meaning of "foreign country" was invoked during the congressional discussions of the Antarctica Treaty. See *The Antarctic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 39, 61 (1960) (statement of Sen. Aiken) ("If this agreement is approved, Antarctica becomes a country without a government."), quoted in *Beattie*, 756 F.2d at 110 (Scalia, J., dissenting).

The legislative history of Section 2680(k) provides further support for the conclusion that Antarctica is a "foreign country" for purposes of the FTCA. Testifying in 1942 as to the provision later adopted as Section 2680(k), Assistant Attorney General Francis M. Shea explained:

> Claims arising in a foreign country have been exempted * * * whether or not the claimant is an alien.

> Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise *to restrict the bill to claims arising in this country*. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.

Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 35 (1942) (emphasis added). See also *United States* v. *Spelar*, 338 U.S. 217, 221 (1949) (quoting testimony). This testimony reveals that the drafters of Section 2680(k) thought it would "restrict the [FTCA] to claims arising in this country," and demonstrates that "foreign country" was not used as a term of art but was instead used in contradistinction to "*this country*." As a matter of common sense and common usage, therefore, Antarctica is a "foreign country" within the meaning of the FTCA even though it is not a sovereign state with its own system of laws.

As the court of appeals observed, moreover, reading the FTCA in the manner proposed by petitioner would create insurmountable conflicts with other provisions of the statute. In the first place, petitioner's interpretation of Section 2680(k) would make the United States liable in foreign regions where there is no law to apply, but 28 U.S.C. 1346(b) makes the United States liable only when "the law of the place where the act or omission occurred" would impose liability on private persons.

In addition, 28 U.S.C. 1402(b), which establishes venue "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," clearly contemplates application of the FTCA only in the United States and its territories. A contrary reading would in effect limit the availability of Antarctic FTCA claims to United States residents, a limitation nowhere contemplated by the statute, which does not incorporate

United States residency as a prerequisite to suit. As the court of appeals recognized, there is no reason to create statutory cacophony where none exists, or to undertake the impermissible task of imposing liability on the United States in a manner not clearly contemplated by the terms of the FTCA's limited waiver of sovereign immunity. See *United States Dep't of Energy* v. *Ohio*, No. 90-1341 (Apr. 21, 1992), slip op. 5 ("any waiver of the National Government's sovereign immunity must be unequivocal," and " '[w]aivers of immunity must be "construed strictly in favor of the sovereign" and not "enlarge[d] . . . beyond what the language requires" ' ") (citations omitted).

2. Even if there were some remaining doubt about the question, the general presumption against extraterritorial application of congressional statutes would foreclose petitioner's attempt to apply the FTCA to claims arising in Antarctica. "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)); accord *United States* v. *Spelar*, 338 U.S. 217, 222 (1949). As the Court explained in *Arabian American Oil Co.*, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." 111 S. Ct. at 1230. Thus, the presumption against extraterritorial application controls "unless there is 'the *affirmative intention* of the Congress *clearly expressed*' " to extend the reach of the statute beyond the Nation's borders. *Ibid.* (emphasis added).

The explicit exclusion from the FTCA of torts arising in foreign countries does not demonstrate congressional intent to provide for extraterritorial application. To the contrary, as the Court stated in *United States* v. *Spelar*, "[t]hat presumption, far from being overcome here, is

doubly fortified by the language of this statute and the legislative purpose underlying it." 338 U.S. at 222 (holding that tort claims arising at United States Air Force Base in Newfoundland fell within the scope of Section 2680(k)). See also *Beattie*, 756 F.2d at 113 (Scalia, J., dissenting) ("even without the 'foreign country' exclusion it would be improper to interpret the FTCA as applying to acts or events in Antarctica. It is perverse to give the explicit exclusion of foreign claims the consequence of expanding the Act"). Since nothing in the FTCA suggests any affirmative congressional intent to subject the federal government to liability for claims arising outside the territorial boundaries of the United States, petitioner's claim was properly rejected.

3. Petitioner correctly contends (Pet. 5) that the court of appeals' decision squarely conflicts with *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984). Accordingly, the Court may wish to grant the petition to resolve the conflict. See Sup. Ct. R. 10.1(a). Nonetheless, this case does not, in our view, present the type of important and recurring question that necessitates resolution by this Court. Compare, *e.g.*, *Tomala* v. *United States*, cert. denied, No. 91-7051 (May 18, 1992); *Onofre* v. *United States*, cert. denied, 112 S. Ct. 648 (1991); *Young* v. *United States*, cert. denied, 112 S. Ct. 384 (1991).

We are presently unaware of any FTCA cases, other than *Beattie* and the decision below, that involve tort claims against the United States for injuries or conduct occurring in Antarctica. While it is no doubt possible that such claims will arise in the future, see *Beattie*, 756 F.2d at 130 (Scalia, J., dissenting), the fact that only two reported cases involving Antarctic FTCA claims have been decided in the decades since the FTCA was enacted suggests that the question presented in the petition is not one of immediate and substantial importance.

Moreover, if the issue ever arises again, the District of Columbia Circuit may well reconsider its holding in *Beattie*. In extending the FTCA to Antarctica, the *Beattie* majority found it "persuasive that Congress did not place a strict geographical limit on the scope of the FTCA, preferring simply to make an exception in the case of foreign countries." 756 F.2d at 95 (emphasis omitted). In essence, then, the *Beattie* majority gave the FTCA extraterritorial application largely because Congress did not clearly express a contrary intent. That approach, of course, is inconsistent with this Court's recent reinvigoration of the traditional rule that the presumption against extraterritorial application of legislation will not be overcome absent "the affirmative intention of the Congress clearly expressed." *Arabian American Oil Co.*, 111 S. Ct. at 1230. To be sure, the presumption against extraterritoriality existed before *Beattie*, but the *Beattie* majority did not even refer to it. Thus, this Court's renewed emphasis on the presumption might lead the District of Columbia Circuit to reexamine its decision in *Beattie* were the question to arise again.

4. Petitioner suggests (Pet. 5) that the Court's decision in *Lujan* v. *Defenders of Wildlife*, No. 90-1424 (argued Dec. 3, 1991), may have implications for the proper resolution of this petition. *Lujan* presents, *inter alia*, the issue whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), is applicable to activities in foreign countries. This Court's resolution of *Lujan* will not affect the decision below, however, because the court of appeals did not rely on the presumption against extraterritoriality in rejecting petitioner's claims. Instead, the court held that the language and structure of the FTCA itself precluded the interpretation urged by petitioner. Accordingly, there is no reason to hold this petition until *Lujan* has been decided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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